

## **MINUTES**

### **MONTANA SENATE 56th LEGISLATURE - REGULAR SESSION**

#### **COMMITTEE ON AGRICULTURE, LIVESTOCK AND IRRIGATION**

**Call to Order:** By **CHAIRMAN REINY JABS**, on March 17, 1999 at 3:20 P.M., in Room 413/415 Capitol.

#### **ROLL CALL**

**Members Present:**

Sen. Reiny Jabs, Chairman (R)  
Sen. Walter McNutt, Vice Chairman (R)  
Sen. Tom A. Beck (R)  
Sen. Gerry Devlin (R)  
Sen. Pete Ekegren (R)  
Sen. Mike Halligan (D)  
Sen. Ric Holden (R)  
Sen. Greg Jergeson (D)  
Sen. Ken Mesaros (R)  
Sen. Linda Nelson (D)  
Sen. Jon Tester (D)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** Carol Masolo, Committee Secretary  
Doug Sternberg, Legislative Branch

**Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**

Hearing(s) & Date(s) Posted:  
Executive Action: SB 361

#### **Additional Information on HB 345**

**CHAIRMAN JABS** invited Steve Welch from Dept. of Environmental Quality to give some insight on the permitting process in conjunction with **HB 345**.

**Steve Welch, Industrial Energy Minerals Bureau, DEQ,** has the task of administering the Open Cut Mining Act, which regulates and requires reclamation of all land mined for sand, gravel and bentonite. Almost everyone who mines sand and gravel is subject to the statutes once they are past the threshold amount of 10,000 cubic yards. Every site they open thereafter is covered by a reclamation plan and bond. Counties, state and federal agencies are exempt from the bond process. The application submitted contains a map, a plan of operations and reclamation plans. The plan of operation provides baseline data of how the site exists currently before they enter it, how they are going to operate and reclaim it. It also has certain commitments on what they will do while they're in there; certain grading requirements, seeding requirements, dates of reclamation, etc. Once we start processing the application, we send the complete application, including the application form and a copy of the reclamation plan, to the respective weed district where that site is located. Everything goes with a cover letter, explaining what it is, where it is and to get in touch if there are questions.

Every reclamation plan an operator submits indicates they will comply with the respective district weed management plan. We visit each site applied for. If the site contains a significant population of weeds, noxious or otherwise, we make note of that. We often notify the applicant what we have seen and to be careful. Generally on a new site, the district weed people know better than I about the root and propagation systems of every weed out there. At least the top six inches of soil materials, whether good soil or not, is moved to the side and stock piled for later use when the pit is closed up. If in fact there is more soil or overburden, that material is salvaged also and does not leave the site.

If we visit the site again during the period of operation and notice any kind of weed invasion, we will contact the operator, suggest he contact the county weed control people and/or a private weed control unit and spray those weeds. We hold bond on these sites until vegetation has reestablished to the point where it is controlling erosion, regenerating and has achieved the proposed post mine land use. Usually in Montana that is back to grazing livestock, but there are other uses such as industrial sites, building sites, etc. However, we will never release bond on a site until those weeds have been controlled and the vegetation is permanent.

A question and answer period followed, which is summarized as follows.

The top six inches of soil is stripped and stock piled. There isn't a problem with contractors spreading this soil as they would not get their bond back until the site is reestablished. Reseeding depends upon the site, soil and type of use proposed. Rate of seeding information is received from the Extension Service, MSU and local Soil Conservation Services. Type of seeding includes developments by the Plant Research Centers.

There is no set procedure if a county does not have a staffed weed board. When the bond inspection is done, the bond is not released until weeds are controlled. Counties will know about applications only because DEQ sends a copy to them. It is DEQ's responsibility to inspect the site when it's completed to see it's put back the way it's supposed to be. Department of Environmental Quality can deny use of gravel from a certain pit under limited guidelines, such as drainage, erosion, steep slopes, difficulty in reclaiming. County weed boards may have some authority to stop a pit from being used.

If an application for a gravel pit was in a weed infested site, there could be a delay in issuing the permit until an effective plan was in place. Gravel pits developed for highway construction can be opened and closed in a relatively short period of time. Other gravel sites may be open for any number of years with a greater likelihood of weeds becoming established.

**CHAIRMAN JABS** Hopefully in the next two years, county weed boards, DEQ and contractors will solve some of these problems. We should encourage the counties to take a look at these pits ahead of time.

*{Tape : 1; Side : B; Approx. Time Counter : 3.53}*

#### EXECUTIVE ACTION ON SB 361

**SENATOR MESAROS** There is a new Fiscal Note dated 3/17.

**Motion:** **SEN. MESAROS** moved that **SB 361 DO PASS AS AMENDED.**

**SENATOR BECK** The House in **HB 2** took some money out of Fish, Wildlife & Parks's budget today.

**Pat Graham** They removed \$200,000 from our budget for doing environmental assessments.

**SENATOR BECK** If it's taken out of your budget, where are we going for that money.

**Pat Graham** An earlier version of this bill put that responsibility on the applicants. That has come out of the bill through various negotiations.

**Paul Sihler** **REP. MOLNAR** stated sportsmen were paying for environmental reviews in the industry and that was not fair or equitable. The industry ought to be self supporting. That was the basis for the amendments. In Section 29, page 25, when all the responsibility was going to be turned over to the Dept. of Livestock, the last sentence says all reasonable costs incurred by the Dept. in performing an environmental review of a new application must be borne by the applicant. In questioning surrounding his amendment, **REP. MOLNAR** said the Dept. can charge for the cost of that environmental review. The problem is we don't have the legal mechanism by which to do that. If you inserted this language we would have a legal mechanism.

**SENATOR HALLIGAN** Can the industry survive this cost?

**Mark Taylor** I spoke with several Representatives regarding the vote on **REP. MOLNAR's** amendment to **HB 2**. In voting for the amendment, several of those Representatives thought Fish, Wildlife & Parks could look for General Fund money instead of to the applicant. In terms of the intent of people who were voting for that amendment, there are funding mechanisms other than those costs being borne by the applicant.

**SENATOR HALLIGAN** What's it going to do to you if you have to come up with all this money if General Fund money isn't available?

**Mark Taylor** The cost to be borne by the applicant for the Environmental Assessment would be after that programmatic was done. There's already a fee mechanism for doing Environmental Impact Statements, more importantly EAs should be significantly decreased under that blue print. If the industry were forced to bear those costs, they would be significantly less than the approximate \$104,000 that FWP currently pays for doing EAs.

**SENATOR BECK** **REP. MOLNAR** is trying to do away with game farming in the state of Montana. There's no way they can afford these programmatic expenses. We have to get that back in General Fund where it was. There was no reason to cut that out. This is for the sportsmen in this state, not for the game farmers.

**SENATOR MESAROS** We absolutely need programmatic for all interests involved. In visiting with Governor Racicot, we discussed this and he totally agreed. It's imperative we try to get the funding back.

**SENATOR BECK** What kind of amendments have to go into this bill since that's happened?

**Doug Sternberg** It would have to be fee related or a specific appropriation for the programmatic from some other source. When the budget comes to the Senate, that would be your option to put that money back in.

**SENATOR BECK** Where does this bill sit if we pass it as is and the money doesn't go to Fish and Game. Is there any trigger that says it goes to the game farmers right now?

**SENATOR JERGESON** If there isn't funding in **HB 2** and there's no mechanism in this bill to charge fees to the industry to pay for the programmatic, then the programmatic won't be done.

**Doug Sternberg** As originally drafted, there was a specific provision in the bill that if the '99 Legislature does not appropriate sufficient money to fund the transfer of administrative functions and fund the development of programmatic review, this act is void. So there had to be some monetary mechanism somewhere along the process that would cover not only administrative transfer functions but also the programmatic, or this wouldn't happen.

**SENATOR DEVLIN** What happens if we put this bill on the table?

**SENATOR MESAROS** It will continue as is with a high level of frustration within the industry. We've backed off on this bill considerably to pursue just a couple provisions, fencing and the record keeping. FWP has been interpreting the laws and rules on the fencing restrictions to make it incredibly difficult to manipulate private property and private business. If we don't pass this bill, there's a high level of frustration that will continue and possibly escalate.

**SENATOR JERGESON** If there's a lawsuit, whether from an applicant who feels wronged or members of the public who feel something is flawed, who pays legal costs for either and/or both Departments? If your revenues are inadequate to cover those legal costs, how do you recover those?

**Mark Bridges** We would have to contract with legal services in the Attorney General's office. It's currently not in our budget.

**SENATOR JERGESON** The numbers in the Fiscal Note don't include potential law suits. You'd have to come in for a supplemental and then raise fees afterwards? In the event of appeal and the

Dept. is successful, does the complainant pay the legal fees or does the Dept.?

**Mark Taylor** Currently, just the applicant if he were successful. With the amendments, only if the applicant were successful would the applicant be able to recover all or a portion of reasonable attorney fees and costs. The current provision does not allow for the Dept. of Fish, Wildlife and Parks to recover any fees and costs.

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**SENATOR JERGESON** If the applicant who went to court were not successful, the Dept. of Livestock could collect legal fees from that person, but Dept. of Fish, Wildlife & Parks could not?

**Mark Taylor** If the applicant would be appealing a proposed decision, because FWP is the licensing or permitting agency, they would be appealing the decision of the FWP. In my interpretation of the bill, Dept. of Livestock would not be involved in any appeal process at all, especially since FWP is the permitting or licensing agency. Currently DoL just issues recommendations regarding the environmental review process and then it goes through the appeal of the FWP's proposed decision.

**SENATOR JERGESON** If a member of the general public goes to court complaining a permit was issued illegally or fencing requirements were not being met, are they entitled to recovery of their legal fees if they are successful?

**Mark Taylor** No, the bill as currently amended would not provide for any interested third party to recover legal fees or costs associated with appealing a license or permit decision.

**SENATOR JERGESON** If they were not successful, would they liable for paying the legal costs of the Dept.?

**Mark Taylor** As the bill currently reads as amended, no.

**SENATOR DEVLIN** Are you going to pursue getting that money back in there?

**Pat Graham** Legal fees would come out of our general hunting & fishing license account. We would probably end up contracting with the Attorney General's Office in the case we had to defend a lawsuit. If we were sued and were to lose, we would pay their legal fees as well as our own. If an applicant were to sue and lost, would they pay? No, not the way the bill is written.

There was some discussion about the programmatic EIA and the \$200,000. There's two separate \$200,000 figures floating around here. The \$200,000 taken out of the budget today is to prepare the EAs for the applications we receive. Right now, if somebody sent in an application and we hire a consultant to process that application, that's the fund we paid for that out of. The programmatic is an additional \$200,000 on top of what we already had in the budget to do the annual processing of the

(**Turn Tape**) New section 32, the funded development of the programmatic review. You're not cut out of that money. It's not in our budget because this is the only mechanism going right now to direct us. There hadn't been anything in our base budget to do a programmatic.

**Paul Sihler** The \$200,000 deficit in the Fiscal Note on the third page is the money that's in the programmatic. Number 12 in the assumptions says FWP would continue to contract for EAs and EIS's. There's a \$208,000 biennial appropriation. That's what the House took out. You have the \$200,000 deficit plus the \$208,000 in assumption 12 the House took out.

**SENATOR DEVLIN** How are you going to recoup that? You're not in the hole already.

**Pat Graham** We are today. This bill addresses an additional expense to the \$208,000 biennial we're spending right now.

**SENATOR BECK** If this bill happens to die, can I get some assurances from you and your Dept. that you will expedite these as quickly as possible? Do we need some type of interim legislative oversight committee to follow up on this? It's the frustration on getting the permits processed. Aren't there some rules you just are ready to promulgate?

**Paul Sihler** We adopted rules after the negotiated rule making process that went on for eighteen months - two years. That's one of the liabilities of negotiated rule making process. You have all the parties sitting around the table; the agency could have promulgated those rules a lot quicker than that. You're talking about the application. In statute, we have certain dates and number of days that we have to process those applications.

**SENATOR MESAROS** The action on the House Floor today has to do with the ongoing applications. That has nothing to do with this bill.

**Pat Graham** Only in that we can't process applications but it doesn't have anything specifically to do with the amendments in

this bill. It does have something to do with the issue you're talking about here.

**SENATOR MESAROS** You're still statutorily required to review those applications.

**Pat Graham** We are. I don't have a clue how we're going to do that if we can't do the environmental assessments.

**SENATOR HALLIGAN** The legislature has passed and the Governor has signed **SB 11**, which puts the Executive Branch under standing committees for the first time. An application comes in, Fish, Wildlife & Parks reviews it, does a completeness review, goes out in the field and takes a look at that application. I don't know what they do with their information.

You are then required to do a fencing analysis to make sure the fencing is going to be up to speed and meets the requirements of the bill. How do you envision the agencies communicating with each other and talk about whether there's a disagreement, a fence put in the wrong spot? How are the agencies going to dovetail the information?

**Mark Bridges** Assuming the programmatic is done and that process goes forth, for FWP's concerns within that game farm application and then our fence review, the program managers within the agencies are going to have to communicate and resolve any ideas and differences that may exist within that process.

**SENATOR HALLIGAN** Agencies have turf battles all the time. People get their backs up a little bit thinking they have the wildlife biologists, or whoever who makes these reviews think they're right, and you guys think you're right. I don't know if you actually think you can make this work as well as the industry hopes it will work. I've seen lots of professionals disagree. Things don't work as well and you get more delays because applications don't get processed.

**Mark Bridges** We'd try our best to get them resolved and process them.

**SENATOR HALLIGAN** Shouldn't there be a lead agency? You're co-equal as far as I can see in the statute.

**Mark Bridges** Anytime you have a split jurisdiction in the mission of Fish, Wildlife and Parks and the mission of the livestock industry, they're different and justifiably so. That's where human patience is going to have to blend together and iron



out differences, whether under this bill if it passes or under the current law.

**SENATOR HALLIGAN** What do you do if there's two agency heads who think they're right. Where do you go?

**Mark Bridges** We have spoken with the Governor in regards to some internal differences.

**CHAIRMAN JABS** Would you briefly explain again the Departments' roles.

**SENATOR MESAROS** As the bill was originally introduced, we attempted to transfer most the primacy to Dept. of Livestock. That's not the case any more. The only things that will be transferred are exterior fencing and record keeping. Record keeping will be in a single repository rather than in two places. Dept. of Livestock is already in charge of quarantine and handling facilities, so it seems to make sense to transfer the exterior fencing to them. That would be consistent with some of their current duties. That's basically what the substantive changes are. We've both modified and narrowed the scope considerably. The changes made in the House are not reflective of this bill; that has to do with ongoing licensing and renewal.

**SENATOR JERGESON** I've struggled mightily over this bill for a long time. I have one and a half constituents involved. I suspect they're both good actors and I think in the case of Kim Kafka, he has been run through the mill. I'm nervous about this bill in spite of all the changes and maybe even because of the change.

We identified whose liability it is depending on whether they lose in the courts. That's an absolute invitation to somebody who is not a good actor to file suit, finding fault for something in their application and how it's been treated by either and both of the Depts. If they win, they get their court costs covered and if they lose, it didn't cost them anything. It's incentive for them to go to court. One or the other of the Depts. are going to end up burying that kind of cost and I don't think it's properly reflected in the Fiscal Note.

I think we can restore the money in **HB 2** that was taken out by the House in Finance and Claims and additionally I think we could put in money for the programmatic EIS. We could decide how we want that money for the EIS be divided various funding sources for either or both departments. We have to recognize the rules, though they shouldn't have taken 4 years to adopt, were finally adopted in February and they haven't had practice with them. I

think we could put in **HB 2** the proper appropriations for the existing responsibilities for the Dept. and the programmatic. We could require them to report on an annual or semi-annual basis to the interim committee that would be responsible for oversight of these two departments over the interim. Then come back next session and find out what needs to be cleaned up and sorted out.

**SENATOR TESTER** We touched a little bit on the last day on the voidness if there isn't sufficient money. Would that be wise for us to put back into this bill?

**Doug Sternberg** It sounded like it does put a specific level of voidness into the bill that wouldn't be there otherwise that's directly fiscally related. That language back in there would make it very clear if the money is not appropriated, this isn't going to happen. If that provision were not left in there, and the budget passed the way we're looking at it today, the both agencies would probably be pretty hard pressed to figure out how to come up with the bucks.

**SENATOR TESTER** It doesn't look like it's good business practice to just let it go.

**SENATOR MESAROS** We're looking at a Senate bill still in the Senate and I'd like to move this. We'll be reviewing **HB 2** in the very near future and will have an opportunity to work on it then. That's where I was hoping we could take action.

**SENATOR BECK** The programmatic study is still in **HB 2**. I understood the environmental reviews coming on down were the things they didn't fund.

**SENATOR JERGESON** In Joint Appropriations, Finance and Claims meeting on the first day of the session, we voted not to include anything in the budget for a bill that had not passed. There has never been anything in the budget, either as it was submitted by the Governor or by adoption of any subcommittee or House Appropriations Committee, to put the programmatic costs that are referenced in this bill into the budget. So it's not there.

**Pat Graham** After discussions with Mark Bridges and myself, the Board of Livestock and **SENATOR MESAROS**, the Governor has committed that regardless what happens with this bill, we recognize there are issues that need to be addressed. A programmatic EIS would be among the things we would like to try to accomplish, which would require some appropriation but it isn't currently in a bill. It would have to be put in the bill, it doesn't take legislation to do that but it would have to be done. In addition, the Governor had offered an independent third

party management consultant to review the program and try to address some of the concerns that have been raised relative to the timing and moving these applications along. That hasn't been put into a budget but that was an offer the Governor has made.

**Doug Sternberg** Reinstate subsection two on page 26 of the continued voidness. Page 26, lines 7 through ten. We took that entire section out as a result of the amendments we adopted.

**SENATOR TESTER's** motions would be reinsert subsection two, lines seven through ten.

*{Tape : 1; Side : B; Approx. Time Counter : 4.29}*

**Motion:** SEN. TESTER moved REINSERT SUBSECTION TWO, LINES SEVEN THROUGH TEN.

**SENATOR MESAROS** The language of that does not appropriate sufficient money to transfer certain administrative functions. That's already taken care of as far as authority in the Dept. of Livestock to raise per capita fees so that's not relative. The second part of it has to do with programmatic.

**Doug Sternberg** So narrow it, "if 1999 Legislature does not appropriate sufficient money to fund the development of the programmatic review as required, then this act is void".

**SENATOR MESAROS** Governor Racicot indicated very clearly he wanted the programmatic to proceed. I think that's a responsible way to go. It's a matter of making sure it's adequately funded.

**Vote:** Motion carried unanimously.

**SENATOR HOLDEN** I want to make sure when Dept. of Livestock gets this authority, they've got the funding so it's not going to hamper or hurt the sheep or cattle industry.

**SENATOR MESAROS** It's in the Fiscal Note. They have the authority to assess per capita fees and are intending to do that so those fees will fully cover the costs borne by the transfer and additional functions by assuming this increased authority. Those costs would be borne by just the alternative livestock producer with per capita fees. It would not affect other budgets.

**Vote:** Motion carried 8-2 with Devlin and Jergeson voting no on a roll call vote. **SENATOR MCNUTT** was absent for the vote.

**ADJOURNMENT**

Adjournment: 4:40 P.M.

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SEN. REINY JABS, Chairman

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CAROL MASOLO, Secretary

RJ/CM

**EXHIBIT** (ags60aad)